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In the Supreme Court of the United States

OCTOBER TERM, 1970

CENTRAL HARDWARE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) has not yet been officially reported. The Board's decision and order (Pet. App. 18-24; A. 17-62, 65-74)[1] are reported at 181 NLRB No. 74.

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[1] "Pet. App." refers to the Appendix contained in the petition. "A." refers to the separate appendix to the briefs in the court below. The Trial Examiner's decision, which the Board adopted as modified, is omitted from the Appendix to the petition.

JURISDICTION

A petition for rehearing was denied on April 26, 1971, and the judgment of the court of appeals was entered on April 30, 1971. The petition for a writ of certiorari was filed on June 1, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that a store-owner had opened his parking lots to the general public and thus that a rule barring non-employee union representatives from engaging in union solicitation on the parking lots violated Section 8(a)(1) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act are set forth at Pet. App. 25.

STATEMENT

In the spring of 1968, the Company, which operates a chain of self-service hardware stores, opened two new stores—the East and West Stores—in the Indianapolis area (Pet. App. 2; A. 21, 24, 99, 113). The company began hiring employees for the stores on about April 15, and hired a work force of about 126 employees for each store by June 3 *(ibid.)*. Meanwhile, the Retail Clerks Union began an organizational campaign, which took place primarily on

the Company's parking lots, where the employees, almost all of whom commuted to work by automobile, parked in designated areas (Pet. App. 3; A. 24-25, 98-99, 103, 108-109, 112, 118-119, 165, 177-178, 223-224, 234).[2]

Initially, the Company prohibited employees from soliciting union membership on all Company premises, including the parking lots (Pet. App. 5-7; A. 29, 30, 67; 134-139, 217). Thereafter, a petition was circulated in the East Store, at the Company's suggestion and on Company time, stating that the signatory employees did not want to be harassed anymore by the Union and did not want to join the Union (Pet. App. 3; A. 31-32, 67; 121-124, 140, 225).[3] 97 of 125 employees signed the petition. Upon receiving the petition, the Company barred all non-employees from soliciting for the Union in the lots of both stores (Pet. App. 3, 7; A. 36, 45, 68-69, 76-77, 82, 89, 91, 103-104, 116, 120, 146).

The parking lots are across the front and along one side of each store (Pet. App. 7; A. 22-23; 102-103, 221-222). The front portion of each lot separates the stores from the street, which in each case

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[2] The Union had compiled a list of names and addresses for about 80 percent of the employees but had difficulty in reaching them at home if they had not first been approached at the store (Pet. App. 2, 3; A. 26-27, 68, n. 2, 81-82, 85-86, 144, 168-172, 175-176, 178-179).

[3] As an example of "harassment," the Company cited an instance in which an employee parked in the lot and two union representatives "persisted" in standing in front of the car doors after she had said she was not interested in joining the Union (A. 116-121, 205, 225).

is a busy highway with no sidewalks (A. 22, 94-95, 100, 102, 156, 158-160, 163-164, 221). Both parking lots are adjacent to other businesses, which have separate parking facilities (Pet. App. 7; A. 23-24; 221-222). Thus, the West Store, which is bounded by West 38th Street and Lafayette Road, shares the West 38th side with a McDonald's hamburger restaurant, and the Lafayette Road side with "Fashion Square"—a carpet store, a restaurant, a gift shop, and a loan company clustered around a parking lot (A. 221). The Company's lot may be entered either directly from West 38th Street or indirectly from Lafayette Road through Fashion Square (A. 23-24, 95-96, 105-107). The East Store, which is bounded by Shadeland Avenue and East 38th Street, shares the premises with a truck station, a car wash, and an office building (A. 232). The Company's lot may be entered either directly from Shadeland Avenue or indirectly from East 38th Street through a drive leading past the office building and its parking lot (A. 23-24, 101, 110-111, 222). No fences or other barriers enclose either parking lot, and neither signs nor posted guards restrict access to either lot (A. 23, 68, 96, 98, 101, 106-107, 110).

The Board found (Pet. App. 20, n. 2; A. 36-43) that the complex in which the Company's stores were located "contains other business enterprises"; that no fences, gates, guards, or signs barred anyone from the Company's lots, which were "accessible to the public without limitation"; and that, therefore, the lots had acquired a "quasi-public status." The Board found that, in these circumstances, the Company's

rule barring non-employees from the parking lot violated Section 8(a)(1) of the Act. The Board ordered the Company to cease and desist from maintaining such a rule (A. 57). The court of appeals (Judge Gibson dissenting) sustained the Board's findings and enforced its order (Pet. App. 1-17).

ARGUMENT

In *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, this Court, relying heavily on *Marsh* v. *Alabama*, 326 U.S. 501, held that the First Amendment prohibited the application of state trespass laws to bar a labor organization, seeking to organize the employees of a store, from picketing at a privately owned shopping center complex where the store was located, since that location "serves as the community business block 'and is freely accessible and open to people in the area and those passing through'" (*id.*, at 319-320). Under the holding of *Logan Valley*, therefore, the union cannot be barred from conducting the organizational activities guaranteed to it by Section 7 of the National Labor Relations Act on the company parking lots if those lots constitute a public facility. The only issue here, therefore, is whether the Board's finding that the Company's parking lots were opened to the public to such an extent as to render the situation similar to that in *Logan Valley* is supported by the record. The court below held that it is (Pet. App. 11),[4] and there

[4] The dissenting judge disagreed principally because he regarded the Board's characterization of the parking lots as

is no occasion for further review of this evidentiary issue. In any event, the facts set out *supra*, pp. 3-4, amply support the Board's finding.

The Company also contends (Pet. 9) that applying *Logan Valley* to this case is inconsistent with *National Labor Relations Board* v. *Babcock & Wilcox*, 351 U.S. 105. In approving limitations on the access of non-employee organizers to the parking lot in *Babcock*, however, the Court noted that the factory parking lot was not generally open to the public. *Id.*, at 107. Nothing in that decision suggests that the same limitations may properly be imposed where the employer, "for his advantage, opens up his property for use by the public in general * * *." *Logan Valley*, *supra*, 391 U.S. at 325. Indeed, the Court, in *Babcock*, emphasized that the employer could "validly post his property against nonemployee distribution of union literature * * * if the employer's notice or order does not discriminate against the union by allowing other distribution. * * *." 351 U.S. at 112. A bar against union solicitation here would result in such discrimination, for the parking lots are open to the general public for other purposes.

"not warranted by the evidence" (Pet. App. 15). The dissenting judge's attempt to distinguish *Logan Valley* on the additional ground that it involved picketing rather than oral solicitation (Pet. App. 14) fails for the reasons given by the Court in *Logan Valley*, 391 U.S. at 315-316.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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